within the discretion of the Health Officer of the county to consider these matters in determining whether or not the Pittsburgh regulations were equivalent to those of West Virginia, and in deciding whether the permit should be issued or refused. In our opinion the refusal of the Health Officer to issue the permit under those circumstances did not involve an abuse of discretion.

Having reached this conclusion we need not pass upon the additional contention of the appellant that the District Court was wholly without jurisdiction to grant the relief prayed in his case. The argument is based upon the long established tenet that a mandamus proceeding is not included within the description of suits of a civil nature at common law of which the federal courts were given jurisdiction by the original Judiciary Act and are now described as civil actions in 28 U.S.C. §§ 1331, 1332, and hence a mandamus may not issue in a federal District Court unless it be necessary for the exercise of its independently conferred jurisdiction.*

Whether it may be said that the rule prohibiting the issuance of mandamus by a federal District Court does not apply, when the jurisdiction of the court is based on diverse citizenship and the issuance of such an order becomes necessary to give effect to the judgment of the court based upon the law of the state, is a question of academic interest only,

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* The origin and basis of the rule was described by Judge John C. Rose, a former member of this court, in his work on Federal Jurisdiction and Procedure, 4 Ed. §192, in these words:

"There was doubtless a practical reason of public policy for reaching that conclusion—a reason which probably explains why the courts have always adhered to the determination they first reached and why Congress has never authorized the federal courts, except in some specially enumerated cases, to entertain petitions for mandamus otherwise than in aid of their other jurisdiction.

for we are satisfied that the power should not be exercised in this case even if it be possessed. Nor have we any reason to decide whether the remedy by injunction would be available under different circumstances.

The judgment of the District Court will therefore be

*Reversed.*

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"Under our dual system of government, there are many opportunities for collision between state and federal authorities. It is not to the public interest that private litigants should be in a position to force them. If a citizen of one state conceived that he had the right to the exercise of some purely ministerial function by a public official of another, he might go into the federal courts and apply for a writ of mandamus to compel that state official to do his duty. In the long run it is probably better that he be forced to seek relief of this kind from a state tribunal. Doubtless state prejudice or partiality sometimes stands in the way of his getting what he should have. If it does, it is a lesser evil than to arouse the antagonisms always so easily stirred up when a federal court undertakes to order a state officer to do something."

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## APPENDIX II

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 7039.

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Clark K. Sleeth, as Health Officer of Monongalia County, West Virginia,
Appellant,

vs.

Dairy Products Company of Uniontown,
Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING.

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This Court having at its November Term, 1955, rendered its decision reversing the judgment of the said District Court appealed from in this cause, and the appellee having on January 25, 1956, filed a petition for a rehearing of the said cause, and the same having been carefully considered.

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

R. DORSEY WATKINS
United States District Judge.

FILED
FEB. 7, 1956

R. M. F. Williams, Jr.
Clerk

## APPENDIX III

## CONSTITUTIONAL PROVISIONS, RULES, STATUTES ORDINANCES AND REGULATIONS INVOLVED

### CONSTITUTION OF THE UNITED STATES

Art. 1, Sec. 8, Clause 3—Commerce.

### TITLE 28 U.S.C.—Jurisdiction

1254.—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . . . . .

### FEDERAL RULE 52(a).—Findings of the Court.

. . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

### WEST VIRGINIA CODE

Chap. 16, Art. 7, Sec. 5, p. 691.

*Regulations by Public Health Council as to Milk and Milk Products.*—The public health council[2] shall adopt

[2] The state board of health has succeeded to the rights, powers and duties formerly imposed upon and exercised by the public health council.

regulations to provide clean and safe milk and fresh milk products, and, when promulgated, these regulations shall be the minimum requirements to be enforced by local health authorities throughout the State. A copy of such regulations shall be furnished the commissioner of agriculture for his guidance in performing any duties with relation to milk and milk products imposed on him by law.

Pertinent Parts of West Virginia Milk Regulations, adopted January 3, 1944, in accordance with Chapter 16, Article 7, Section 5, of the Code of West Virginia.

SECTION 3.—*Permits.*—It shall be unlawful for any person to bring into or receive into the State of West Virginia, or its police jurisdiction, for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product defined in this regulation, who does not possess a permit from the health officer.

Upon written application the health officer shall issue a permit to any person who complies with the requirements of this regulation.

Such a permit may be suspended by the health officer, or revoked after an opportunity for a hearing by the health officer, upon the violation by the holder of any of the terms of this regulation.

Upon written application the health officer shall reinstate or issue a new permit to any person whose permit has been suspended or revoked and has complied with all the requirements of this regulation.

SECTION 5.—*Inspection of dairy farms and milk plants for the purpose of grading or regrading.*—At least once during each grading period the health officer shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the State of West Virginia, or its police jurisdiction. In case the health officer discovers the violation of any item of sanitation, he shall make a second inspection after a lapse of such time as he deems necessary for the defect to be remedied, but not before the lapse of 3 days; and the second inspection shall be used in determining the grade of milk and/or milk products. Any violation of the same item of this regulation on two consecutive inspections shall call for immediate degrading.

One copy of the inspection report shall be posted by the health officer in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be defaced or removed by any person except the health officer. Another copy of the inspection report shall be filed with the records of the health department.

SECTION 6.—*The examination of milk and milk products.*—During each grading period at least four samples of milk and cream from each dairy farm and each milk plant shall be taken on separate days and examined by the health officer. . . . Bacterial plate counts and direct microscopic counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association. Examinations may include such other chemical and physical determinations as the health officer may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the

Association of Official Agricultural Chemists. Samples may be taken by the health officer at any time prior to the final delivery of the milk or milk products. . . .

Whenever the average bacterial count, the average reduction time, or the average cooling temperature falls beyond the limit for the grade then held, the health officer shall send written notice thereof to the person concerned, and shall take one additional sample, but not before the lapse of 3 days, for determining a new average in accordance with section 1(S). Violation of the grade requirement by the new average or by any subsequent average during the remainder of the current grading period shall call for immediate degrading or suspension of the permit, unless the last individual result is within the grade limit.

SECTION 11.—*Milk and milk products from points beyond the limits of routine inspection.*—Milk and milk products from points beyond the limits of routine inspection of the State of West Virginia may not be sold in the State of West Virginia or its police jurisdiction, unless produced and/or pasteurized under provisions[3] equivalent to the requirements of this regulation; provided that the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions.

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West Virginia Milk Regulations were amended September 16, 1954; as amended

[3] which are substantially equivalent to the requirements of this regulation, and which are enforced with equal effectiveness, as determined by a milk-sanitation rating: Provided, That the health officer may satisfy himself that conditions shown by the milk sanitation survey continually remain substantially the same

SECTION 15.—*Enforcement interpretation.*[4]—This ordinance shall be enforced by the health officer in accordance with the interpretations thereof contained in the 1939 edition of the United States Public Health Service Milk Code.

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No. 210

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AN ACT

To safeguard human health and life by providing for the issuance of permits to, and regulation of persons and entities selling milk and milk products; conferring powers, and imposing duties on the Secretary of Health, the Advisory Health Board; and otherwise providing for the administration of the act; and imposing penalties.

Section 1. Be it enacted, &c., That for the purpose and within the meaning of this act, the following definitions shall obtain:

Regulating entities and persons selling milk and milk products.

Definitions.

"Milk" means milk, skimmed milk, cream, sour milk, sour cream, buttermilk, and all other fluid derivatives of milk, except condensed milk and evaporated milk for manufacturing purposes.

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[4] This regulation shall be enforced by the health officer in accordance with the interpretations thereof contained in Milk Ordinance and Code—1953 Recommendations of the Public Health Service.

"Milk products" means ice cream, ice cream mix, custard ice cream, french ice cream, frozen custard, and other similar frozen products, and all dairy products used in the manufacture thereof.

"Certified Milk" means the product of dairy farms operated in accordance with the "Methods and Standards for the Production and Distribution of 'Certified Milk,' last adopted by the American Association of Medical Milk Commissions Incorporated," and the production and handling of which shall be certified to by a commission instituted in compliance therewith.

"Secretary" means the Secretary of Health of this Commonwealth, or his authorized representative.

"Person" includes singular and plural, masculine and feminine, and any individual, firm, copartnership, institution, association, or corporation thereof.

"To Sell" "for sale" or "sold" and similar terms means the selling, exchanging, delivering, or having in possession, care, control, or custody with intent to sell, exchange, or deliver, or to offer or to expose for sale.

"Dairy farm" is a place or premise where one or more cows are kept, and a part or all the milk from which is sold or delivered to any person.

"Milk plant" is any place or premise or establishment where milk is collected, separated, processed, stored, bottled, pasteurized, or prepared in any manner for sale as milk or milk products.

"Approved inspector" is one, who has proven to the satis-

faction of the secretary, to be a person of good character, trained by school and experience to carry on dairy farm and milk plant inspection in a capable and efficient manner, and has received a certificate of approval from the secretary. Applications for certificates of approval for approved inspectors shall be made on forms which may be secured from the Secretary of Health, and shall be accompanied by a fee of ten ($10) dollars. Certificates of approval shall expire on December thirty-first of each year. Applications for renewal shall be made on forms satisfactory to the Secretary of Health, and shall be accompanied by a registration fee of three ($3) dollars, and shall be returned to the Secretary of Health not later than December fifteenth of each year. Certificates of approval shall not constitute an approved inspector an official employe, agent or authorized representative of the Department of Health, nor shall he represent himself so to be.

Certificates of approval may be refused, suspended or revoked for cause, upon such notice and subject to such conditions, as the secretary shall deem necessary.

"Municipality" includes any city, borough, town, or township in this Commonwealth.

Permit.

Section 2. Except as hereinafter provided, no person shall sell milk or milk products within this Commonwealth without first having obtained a permit from the "secretary," nor otherwise than in accordance with the requirements of this act. Each person desiring a permit to sell milk or milk products shall annually make an application therefor on a form to be secured from

the "secretary." Such application shall set forth—

Contents of the application.

(a) The name and address of the applicant.

(b) The designations of the milk or milk products to be offered for sale.

(c) The name of the municipality or municipalities in which the applicant desires to sell milk or milk products.

(d) An accurate record of each milk plant owned or operated by the applicant for a permit.

(e) Such other information as may be required by the "secretary."

Permits shall be issued only to persons, whose entire milk supply, the farms, where it is produced and the milk plants in which the milk or milk products is handled, have been approved by the secretary, and in any case in which, in his discretion, he shall deem such action necessary for approval, inspected by the secretary. Every permit shall expire annually.

This section shall not apply to a person selling or delivering milk directly from a dairy farm to a milk plant.

Unless the "secretary" shall require a permit, this section shall not apply to a person selling milk or milk products from a store, when such milk or milk products are purchased from a person already in lawful possession of a permit to sell milk or milk products.

This section shall not apply to hotels, restaurants, soda fountains, boarding houses, or other places where milk or milk products is served, when such milk or milk products is to be consumed on the premises thereof, and is purchased from one already in lawful possession of a permit to sell milk or milk products.

The "secretary" may, in his discretion, exempt a person selling milk from not more than one cow from such requirements of this act, as he may deem in each instance to be unnecessary for the protection of the public health.

Section 3. Permits may be refused, suspended or revoked by the "secretary" if, in his judgment, the requirements of this act, and the rules and regulations made in conformity herewith are not complied with by the person making an application for a permit, or to whom a permit has already been issued.

Before refusal to grant a permit or before a permit is suspended or revoked, the secretary shall afford the applicant or holder of the permit an opportunity to be heard, and shall give at least five (5) days written notice of the hearing to the applicant or the holder of the permit, by registered letter sent to the address given in the application. Any person aggrieved by a decision of the secretary, either refusing to re-issue a permit or revoking a permit heretofore issued, may file, within five (5) days thereafter in the court of common pleas of Dauphin County, a bill in equity against the secretary as defendant, alleging therein, in brief detail, the action and decision complained of, and praying for relief, and jurisdiction is hereby conferred upon said court for hearing and disposing of such cases.

Section 4. When an application for renewal of a permit has been regularly made and no notification of a hearing as above described has been sent the applicant by the secretary, the permit of the preceding year shall continue in full force until renewed or revoked in accordance with section 2 and section 3.

Section 5. The secretary may constitute as his agent, for the purpose of issuing permits for the sale of milk or milk products, a department of health, board of health, or health officer of any municipality, and shall accept permits issued by municipalities, under the terms of municipal ordinances equally as stringent as the requirements of this act and enforced by such municipalities, as the only permit required for the sale of milk or milk products in such municipalities.

Section 6. Every person, having made an application for a permit to sell milk or milk products or holding a permit for the sale of milk or milk products, shall, at any time, allow the "secretary" to inspect the herds, stables, and dairy farms from which milk is obtained, handled, or prepared for sale, to inspect the milk plants, pasteurizing, bottling, and handling of milk or milk products, examine books and papers wherein a record is kept of the name and address of each person from whom "milk" or "milk products" is purchased, the amount of "milk" or "milk products" purchased, and the date on which the "milk" or "milk products" was purchased, in any manner whatsoever, and to take such samples of milk or milk products, as may be deemed necessary, upon payment therefor at the usual market price when payment is demanded. The "secretary" shall have the power to subpoena, for the purpose of any hearing, all books and records of any permit holder or of any other corporation or person in any case in which records in its or his possession,

or over which it or he has control, is reasonably necessary to the proper conduct of the affairs of the secretary under this act.

Non-compliance with the provisions of this section by a permit holder is hereby specifically declared to be a violation of this act and subject to the penal provisions hereof, and shall be sufficient grounds for the revocation of the permit of such permit holder.

Section 7. No person shall sell milk that does not bear prominently the designation "Certified Milk" or "Raw Milk" or "Milk for Pasteurization" or "Pasteurized Milk." Other designations may be used with the designation of "Raw Milk" or "Pasteurized Milk," provided the definition of such designation is filed with and approved by the "secretary."

No person shall sell milk products that do not bear prominently the name and address or code number of the processor or maunfacturer, the kind of milk products offered for sale, and the name and location of the milk plant in which the milk products are processed or manufactured.

Section 8. "Raw Milk" shall be produced and handled in the following manner:

(a) "Raw Milk" shall be milk from a cow or cows, determined by physical examination and tuberculin tests conducted in accordance with the rules, regulations, and practices of the State Department of Agriculture pertaining to the individual accredited herd plan or the modified accredited area plan, to be free from communicable disease.

(b) The cows shall be fed, watered, housed, and cared for in such a manner that the milk will be clean and free from disease-producing organisms.

(c) The milking process shall be carried on in a cleanly manner. The milk shall be promptly cooled. The milk containers, utensils, and equipment shall be of such material and so constructed that they may be readily cleaned. The milk and the cleansed containers, utensils, and equipment shall be protected from flies.

(d) A milk house or milk rooms which are properly constructed, lighted, ventilated, drained, and kept clean shall be provided and used exclusively for the handling of "Certified Milk" or "Raw Milk." An adequate supply of steam or hot water shall be provided and used for cleansing milk containers and dairy utensils.

(e) Every applicant for or holder of a permit to sell raw milk, desiring to purchase milk for resale as raw milk, shall receive permission from the "secretary" before accepting milk from any source other than that given in the application for a permit. All sources of raw milk shall be inspected and approved by the "secretary."

Section 9. Every applicant for or holder of a permit to sell pasteurized milk or milk for pasteurization or milk products shall keep an accurate record of the names and addresses of the owners or operators of all dairy farms from which milk is received. This record shall be kept on file in the milk plant where the milk is received, and shall be available at all times for the inspection of the secretary.

An accurate report of a sanitary inspection on all dairy farms from which milk is received and of the milk as de-

livered to the milk plant shall be kept on file in the milk plant. The sanitary inspection shall be made semi-annually by an approved inspector at the expense of the applicant for or holder of a permit. Such payment shall be made only by the applicant for or holder of the permit for the plant to which the milk from the farm which is inspected is or is to be delivered. Such inspections may be made by the secretary. Within thirty days after demand by the secretary, additional inspections shall be made of any or all farms, and reports thereon filed in the milk plant. Inspection reports shall be made upon forms satisfactory to the secretary.

No applicant for or holder of a permit to sell pasteurized milk or milk for pasteurization or milk products shall receive milk from a dairy farm until the report of the sanitary inspection made by an approved inspector shall have been placed on file in the milk plant where the milk is received for the inspection and approval of the secretary, nor shall he receive milk or milk products from any milk plant owned or operated by another person who is not in lawful possession of a permit.

No milk or milk products shall be received in any milk plant for any purpose, unless such milk or milk products shall have been produced on dairy farms, or acquired from milk plants approved by the secretary, or unless permission for the receipt of such milk or milk products shall be obtained from the secretary.

Only milk or milk products may be prepared or processed in a milk plant.

Section 10. "Milk for Pasteurization" shall be milk produced and handled in the following manner:

(a) "Milk for Pasteurization" shall be milk from a cow or cows, determined by physical examination and tuberculin tests conducted in accordance with the rules, regulations and practices of the State Department of Agriculture, pertaining to the individual accredited herd plan or the modified accredited area plan, to be free from communicable disease.

(b) The cows shall be fed, watered, housed, and cared for in such manner that the milk will be clean.

(c) The milking process shall be carried on in a cleanly manner. The milk shall be promptly cooled. The milk containers, utensils and equipment shall be of such material and so constructed that they may be readily cleansed.

(d) A milk house or milk rooms properly constructed, lighted, ventilated, drained, and clean shall be provided on the dairy farm producing milk for sale as "Milk for Pasteurization," and shall be used exclusively for the handling of such milk.

Section 11. Milk containers in which "Milk for Pasteurization" is received in milk plants from dairy farms shall be thoroughly cleansed and dried before returning to the dairy farm.

(a) Milk plants in which "Milk for Pasteurization" is received from dairy farms shall be properly constructed, lighted, ventilated, drained, and clean.

(b) The milk plants in which "Milk for Pasteurization" is received shall not be constructed nor altered until the plans and specifications thereof have received the approval of the "secretary." Equipment before being installed shall likewise be approved by the secretary.

(c) "Certified Milk" or "Raw Milk" may be sold as "Milk for Pasteurization."

Section 12. "Pasteurized Milk" shall be milk produced and handled in the following manner:

(a) "Pasteurized Milk" is milk heated to such a temperature and for such a length of time that all harmful organisms are destroyed.

(b) "Milk for Pasteurization" shall be used in the preparation of "Pasteurized Milk."

The holder of a permit to sell "Pasteurized Milk" may purchase "Milk for Pasteurization" from a person in lawful possession of a permit to sell "Pasteurized Milk."

(c) Milk containers in which milk is received in milk plants in which milk is pasteurized shall be thoroughly cleansed and dried before returning to a dairy farm or a milk plant.

(d) Apparatus for the pasteurization of milk shall be equipped with an accurate indicating thermometer and a recording thermometer of a type approved by the secretary. A true record of pasteurization as given by the recording thermometer shall be on file at the place where the milk is pasteurized.

(e) Milk to be sold as "Raw Milk" may be received, cooled, and bottled in a building where milk is pasteurized, providing all milk received in the building where milk is pasteurized meets the requirements for "Raw Milk" as set forth in this act.

(f) The rooms of buildings, in which milk is exposed during and after pasteurization, shall be properly lighted, ventilated, drained, and clean, and shall be used for no other purpose than to provide a place for cleansed milk containers and utensils, and for the handling of milk during and after pasteurization.

(g) Milk during and after pasteurization, and cleansed milk containers, utensils, and equipment shall be protected from flies.

(h) Pasteurizing plants shall be provided with and use an adequate supply of steam or hot water for cleansing milk containers, utensils, and equipment.

(i) Equipment with which milk comes in contact shall be constructed in such manner as to be easily cleansed. Demountable apparatus, with which milk comes in contact, shall be taken apart and cleansed each day such apparatus is in use. Surfaces with which milk comes in contact shall be of smooth non-corrosive material and free from open seams.

(j) "Pasteurized Milk" shall be placed in the final container in the milk plant where the milk is pasteurized immediately after pasteurization.

(k) The milk plants in which milk is received or pasteurized shall not be constructed nor altered until the plans and specifications thereof have received the approval of the "secretary." Equipment before being installed shall likewise be approved by the secretary.

Section 13. Adequate facilities shall be provided and used for furnishing clean containers, free from injurious organisms, in which to sell "Raw Milk" or "Pasteurized Milk"

or "Milk for Pasteurization" or "Milk Products." Bottles or containers, whether of glass or other material, shall be filled and closed without any part of the hand coming in contact with the inner surface of the bottles or containers, or in contact with bottle caps. Caps shall be obtained in sanitary containers and kept therein until used.

Section 14. Milk plants, in which milk or milk products is handled, received, bottled, or pasteurized, shall be provided with sanitary, adequate and conveniently located toilet facilities.

Section 15. The water supply used in milk plants shall be sufficiently abundant for all purposes, easy of access, and free from contamination.

Section 16. The Secretary of Health shall have the power to make requirements concerning the number and character of bacteria in milk and milk products after hearing.

Bacteriological analysis of milk and milk products shall be made under the supervision of a laboratory, the equipment and director of which have been approved by the Secretary of Health. The bacteriological analysis of milk and milk products shall be in accordance with Standard Methods of Milk Analysis of the American Public Health Association and the Association of Official Agricultural Chemists last adopted, unless special permission is given by the secretary for a modification of the above standard methods.

Section 17. "Milk products" shall be prepared from milk produced and handled in the following manner:

(a) "Milk for Pasteurization" shall be used in the preparation of "milk products."

(b) The "Milk for Pasteurization" used in the preparation of "milk products" shall be pasteurized or otherwise treated as indicated by the "secretary" before or during the preparation of "milk products."

(c) Milk containers in which "Milk for Pasteurization" is received in milk plants for the preparation of "milk products" shall be thoroughly cleansed and dried before returning to a dairy farm or a milk plant.

(d) The rooms of buildings in which "milk products" are exposed during and after preparation shall be properly lighted, ventilated, drained, and clean, and shall be used for no other purpose than to provide a place for cleansed containers and utensils and for the handling of "milk products."

(e) "Milk products" during and after preparation, and cleansed containers, utensils, and equipment shall be protected from flies.

(f) Milk plants in which "milk products" are prepared shall be provided with an adequate supply of steam or hot water for cleansing containers, utensils, and equipment.

(g) Equipment with which "milk products" come in contact shall be constructed in such a manner as to be easily cleansed. Demountable apparatus with which "milk products" come in contact shall be taken apart and cleansed each day such apparatus is in use. Surfaces with which "milk products" come in contact shall be of smooth non-corrosive material and free from open seams.

(h) The milk plants in which "milk products" are prepared shall not be constructed nor altered until the plans and specifications thereof have received the approval of the

"secretary." Equipment before being installed shall likewise be approved by the secretary.

Section 18. The provisions of this act, and the regulations made thereunder, shall not be taken nor deemed to repeal existing municipal ordinances, nor to prevent municipalities from enacting and enforcing new ordinances for the further protection of the public health: Provided, That this act shall be considered as establishing uniform requirements and regulations, and that nothing herein contained shall be deemed to prevent municipalities from ordaining and enforcing such additional requirements in excess of the requirements and regulations hereunder, as may be deemed necessary, from time to time for the preservation of public health, and to require applications from, and to issue permits to, such persons as may be defined by local ordinances.

Section 19. The advisory health board of the State Department of Health is hereby authorized to adopt and promulgate rules and regulations for the proper enforcement of this act.

Section 20. Any person violating any provisions of this act or rules and regulations pertaining thereto shall, upon conviction thereof, before any magistrate, alderman, or justice of the peace in the county where the offense shall have been committed, be subject to a fine of not less than ten dollars ($10) and not more than fifty dollars ($50) for each offense, to be collected by summary conviction as like fines are now collected by law, or in case of nonpayment of the fine to undergo imprisonment in the county jail for a period not exceeding thirty days: Provided, That any person convicted more than twice of violating the same provisions of this act or rules and regulations pertaining there-

to shall be subject to a fine of not less than fifty dollars ($50) nor more than two hundred and fifty dollars ($250), or in case of nonpayment of the fine to undergo imprisonment in the county jail for a period not less than thirty days nor more than six months.

Prosecutions for violations of any of the provisions of this act and the regulations thereto shall be brought by the Secretary of Health or his agent or by any health officer of any municipality in this Commonwealth.

All fines collected under this act shall be paid to the secretary and by him into the State Treasury, through the Department of Revenue.

Section 21. Whenever, in the opinion of the secretary, a given supply of milk or milk products is considered unsafe or a menace to public health, the secretary may seize, condemn, denature, or destroy such milk or milk products without compensation to the owner or owners thereof.

The general sanitary conditions of any place, wherein milk or milk products are produced, stored, prepared, or handled and its immediate surroundings, shall be such as to insure a safe and clean supply of milk or milk products.

The secretary shall have the right to exclude from sale any part of a milk supply which may be considered unsafe, or milk or milk products which is produced on dairy farms or handled in milk plants which fail to meet the requirements of this act.

A satisfactory flush closet or sanitary privy shall be provided at all dairy farms where milk is produced or handled.

Section 22. The Attorney General may, at the instance of the Secretary, in the name of the Commonwealth institute proceedings in equity in the court of common pleas of Dauphin County for the purpose of enjoining any person from offering milk or milk products for sale without a permit as provided in this act, and for such purpose jurisdiction is hereby conferred upon said court. In such case the Attorney General shall not be required to give bond.

Section 23. Constitutional Construction.—It is hereby declared to be the legislative intent that if this act cannot take effect in its entirety because of the decision of any court holding unconstitutional any part thereof, the remaining provisions of the act shall be given full force and effect as completely as if the part held unconstitutional had not been included herein.

Section 24. The act of May second, one thousand nine hundred and twenty-nine (Pamphlet Laws, one thousand two hundred twenty-nine), entitled "An act to safeguard human health and life by providing for the licensing and regulation of persons and entities dealing in milk for human consumption; conferring powers and imposing duties on the Secretary of Health, and the Advisory Health Board, and otherwise providing for the administration of the act; and imposing penalties," as amended by the acts, approved the eighteenth day of May, one thousand nine hundred and thirty-three (Pamphlet Laws, eight hundred four), the twenty-second day of May, one thousand nine hundred and thirty-three (Pamphlet Laws, eight hundred thirty-two), and the seventeenth day of January, one thousand nine hundred and thirty-four (Pamphlet Laws, two hundred thirty-one—one thousand nine hundred thirty-three—one thousand nine hundred thirty-four), are hereby repealed.

All other acts or parts of acts inconsistent herewith are hereby repealed.

Section 25. The permits heretofore granted by the Secretary of Health under the terms of the act of one thousand nine hundred twenty-nine (Pamphlet Laws, one thousand two hundred twenty-nine), and the amendments thereto, shall remain in full force and effect as permits under this act until such time as they, respectively, by their terms expire, or until the secretary shall revoke or suspend the same in accordance with his powers hereunder.

When effective.

Section 26. This act shall become effective immediately upon approval by the Governor.

APPROVED—The 2d day of July, A. D. 1935.

GEORGE H. EARLE

The foregoing is a true and correct copy of Act of the General Assembly No. 210.

[ Signed ]

*Secretary of the Commonwealth*

THE ADVISORY HEALTH BOARD OF THE PENNSYLVANIA DEPARTMENT OF HEALTH AT A MEETING HELD IN THE CITY OF HARRISBURG, OFFICE OF THE SECRETARY OF HEALTH, APRIL 24, 1940, ADOPTED THE FOLLOWING RULES AND REGULATIONS FOR THE ENFORCEMENT OF ACT 210, APPROVED JULY 2, 1935, P. L. 589, AN ACT "TO SAFEGUARD HUMAN HEALTH AND LIFE BY PROVIDING FOR THE ISSUANCE



OF PERMITS TO, AND REGULATION OF PERSONS AND ENTITIES SELLING MILK AND MILK PRODUCTS; ENFORCING POWERS, AND IMPOSING DUTIES ON THE SECRETARY OF HEALTH, THE ADVISORY HEALTH BOARD; AND OTHERWISE PROVIDING FOR THE ADMINISTRATION OF THE ACT; AND IMPOSING PENALTIES."

I. PERMITS. *Section 2*—The permit year shall begin September 1st and end August 31st the following year.

II. DESIGNATIONS. *Section 7*—The term "Prominently" means most important in appearance and conspicuous in position.

In addition to the designation "Certified Milk," "Raw Milk," "Milk for Pasteurization," or "Pasteurized Milk," there shall appear on the milk container sufficient name and address to identify the person to whom the permit has been issued for the sale of the milk.

The term "Other Designations" shall include such designations as "A," "Homogenized," or "Vitamin D."

Designations including the day of the week or the day of the month shall, when used with the designation "Raw Milk," mean the day produced and, when used with the designation "Pasteurized Milk," mean the day pasteurized. Trade marks that do not interfere with or detract from the designation of the milk or milk products may be used.

III. RAW MILK. *Section 8, Paragraphs (b), (c) and (d)*—

1. The water supply, if from a spring or well, shall be protected from all surface and underground contamination. The well shall be protected with a cover of concrete or equally impervious material.

2. Toilets shall not be located so as to endanger the water supply. Privies shall have fly tight vaults. Excreta shall be removed before it reaches the ground level. Cesspools and septic tanks shall not overflow to the surface of the ground.

3. It is recommended that flanks, udders and tails of the cows be clipped at the time of stabling in the fall to make it easier to keep the cows clean.

4. Sufficient light shall be provided so that the necessary work can be carried on in the stable during daylight. Two square feet of unobstructed light for each animal or stanchion in the stable is considered satisfactory.

5. Sufficient ventilation shall be provided for the health of the animals and to eliminate odors in the stable. Five hundred cubic feet of air space per cow is considered satisfactory.

6. Stable floors, drops, and feeding alleys shall be constructed of concrete or equally satisfactory material and kept in good repair. The walk back of the cows, excluding the gutter, shall be at least three feet in width.

7. Manure shall be removed from the stable daily and disposed of so that the milking animals do not have access to same.

8. Stable walls shall be reasonably smooth. The ceil-

ing shall be tight to prevent dust from sifting through. Walls and ceilings should be whitewashed annually or painted biennially.

9. Barn yard shall be properly graded and drained in order to eliminate the accumulation of water. Waste from pig pens, barns, and milk houses should not drain into the yard.

10. Hogs, pigeons, poultry, and other objectionable animals shall be excluded from the cow stable.

11. Milk utensils and containers used in the production of milk shall be constructed of non-corrodible, smooth metal, free of open seams, rust, rough solder, or wooden handles. Seamless or electrically welded utensils and containers are recommended. Cans shall be returned to the farm in a clean and dry condition. Single-service straining material shall be used.

12. Utensils, containers, and equipment, after being washed and sterilized, shall be stored in the milk room or other protected room. Suitable metal racks, at least ten inches above the floor, shall be provided for the storage of utensils.

13. Milking machines shall be constructed in such a manner that they can be readily taken apart for cleansing, and after cleansing and sterilizing they shall be stored in such a manner as to prevent contamination.

14. Wet hand milking is prohibited as it is considered a dangerous and insanitary practice.

15. A strip cup shall be used in order to determine any

abnormalities in the milk. The milk in the strip cup shall not be sold. Abnormal milk shall not be sold.

16. Every precaution shall be taken to protect the milk from flies in the cow stable, as flies are recognized as a carrier of disease.

17. Milk stools shall be constructed so that they can stand on the floor without falling over; if of wooden construction, they should be painted. Milk stools shall be clean and stored in a clean place.

18. Proper milk cooling equipment shall be provided.

19. Milk shall be cooled except when milk is delivered to the consumer in his own container in the milk house.

20. A one-room milk house or a single milk room shall be sufficient if the milk is sold to the consumer in containers brought to the dairy farm by the consumer; otherwise a milk house containing two or more rooms shall be provided.

(a) Sufficient light shall be provided in the milk house to carry on the necessary operations.

(b) Ventilation shall be provided to eliminate odors in the milk house. It is recommended that cross-ventilation be provided by windows located as close to the ceiling as possible, and constructed so that the top sash is movable and a flat screen may be placed on the outside.

(c) Flies shall be kept out of the milk house.

(d) The milk house shall be lined and ceiled inside and of smooth finish.

(e) It is recommended that the inside of the milk house be painted with a light-colored paint, preferably of gloss variety.

(f) The floor of the milk house shall be of concrete or equally impervious material and shall be constructed in such a manner that it will drain properly. Water from the floor shall not drain into the cooling tank. In future construction, impervious material shall be used to a height of at least ten inches above the floor.

(g) The milk house shall not open directly into a stable nor a room used for domestic purposes, nor shall it be located in the barn yard.

(h) The milk house shall be used only for the handling of milk and milk utensils and should be located as conveniently to the stable as possible, giving consideration to objectionable features such as hog pens, toilets, etc. It shall be large enough to allow sufficient unobstructed working space.

(i) When the milk house is located at a distance from the milking stable, and is not used regularly for straining milk, a suitable straining room shall be provided at a more convenient location. The straining room shall conform to the same specifications as the milk house with the exception of the cooling vat.

21. "Raw Milk" shall be delivered to the consumer only in containers that have been filled in milk house or milk room.

22. A mechanical means of filling and capping bottles shall be used.

23. The usually accepted practices regarding sanitation shall be considered in scoring methods.

IV. MILK FOR PASTEURIZATION. *Section 10, paragraph (b), (c) and (d)—*

1. The water supply, if from a spring or well, shall be protected from all surface and underground contamination. The well shall be protected with a cover of concrete or equally impervious material.

2. Toilets shall not be located so as to endanger the water supply. Privies shall have fly-tight vaults. Excreta shall be removed before it reaches the ground level. Cesspools or septic tanks shall not overflow to the surface of the ground.

3. It is recommended that flanks, udders and tails of cows be clipped at the time of stabling in the fall to make it easier to keep the cows clean.

4. Sufficient light shall be provided so that the necessary work can be carried on in the stable during daylight. Two square feet of unobstructed light for each animal or stanchion in the stable is considered satisfactory.

5. Sufficient ventilation shall be provided for the health of the animals and to eliminate odors in the stable. Five hundred cubic feet of air space per cow is considered satisfactory.

6. Stable floors, drops, and feeding alleys shall be constructed of concrete or equally satisfactory material and kept in good repair. The walk back of the cows, exclud-

ing the gutter, shall be at least three feet in width.

7. Manure shall be removed from the stable daily and disposed of so that the milking animals do not have access to same.

8. Stable walls shall be reasonably smooth. Ceiling shall be tight to prevent dust from sifting through. Walls and ceilings should be whitewashed annually or painted biennially.

9. Barn yard shall be properly graded and drained in order to eliminate the accumulation of water. Waste from the pig pens, barns, and milk houses should not drain into the yard.

10. Hogs, pigeons, poultry, and other objectionable animals shall be excluded from the cow stable.

11. Milk utensils and containers, used in the production of milk, shall be constructed of non-corrodible, smooth metal, free of open seams, rust, rough solder, or wooden handles. Seamless or electrically welded utensils and containers are recommended. Cans shall be returned to the farm in a clean and dry condition. Single-service straining material shall be used.

12. Utensils and containers after being washed shall be stored inverted on a metal rack in the milk house. The metal rack shall be at least ten inches from the floor in order to prevent splashing into the utensils when washing the floor.

13. Milking machines shall be constructed in such a manner that they can be readily taken apart for cleansing

and after cleansing, they shall be stored in such a manner as to prevent contamination.

14. Wet hand milking is prohibited, as it is considered a dangerous and insanitary practice.

15. A strip cup shall be used in order to determine any abnormalities in the milk. The milk in the strip cup shall not be sold. Abnormal milk shall not be sold.

16. Every precaution shall be taken to protect the milk from flies in the cow stable, as flies are recognized as a carrier of disease.

17. Milk stools shall be constructed so that they can stand on the floor without falling over; if of wooden construction, they should be painted. Milk stools shall be clean and stored in a clean place.

18. Cooling tanks shall be constructed of cement or equally impervious material, and shall be deep enough for the water to reach the neck of the can so that no milk is above the surface of the water. An insulated tank with an insulated cover is recommended. A drain should be provided in the tank for proper cleansing.

19. The water in the tank shall be changed frequently to keep it clean.

20. The milk shall be cooled promptly to 60 degrees Fahrenheit, and maintained at that temperature until delivered to the milk plant. In case milk is not cooled, it should be delivered to the milk plant within two hours from the time of milking.

21. (a) Sufficient light shall be provided in the milk

house to carry on the necessary operations.

(b) Ventilation shall be provided to eliminate odors in the milk house. It is recommended that cross-ventilation be provided by windows located as close to the ceiling as possible, and constructed so that the top sash is movable and a flat screen may be placed on the outside.

(c) Flies shall be kept out of the milk house.

(d) The milk house shall be lined and ceiled inside and of smooth finish.

(e) It is recommended that the inside of the milk house be painted with a light-colored paint, preferably of gloss variety.

(f) The floor of the milk house shall be of concrete or equally impervious material and shall be constructed in such a manner that it will drain properly. Water from the floor shall not drain into the cooling tank. In future construction, impervious material shall be used to a height of at least ten inches above the floor.

(g) The milk house shall not open directly into a stable nor a room used for domestic purposes, nor shall it be located in the barn yard.

(h) The milk house shall be used only for the handling of milk and milk utensils and should be located as conveniently to the stable as possible, giving consideration to objectionable features such as hog pens, toilets, etc. It shall be large enough to allow sufficient unobstructed working space.

(i) When the milk house is located at a distance

from the milking stable, and is not used regularly for straining milk, a suitable straining room shall be provided at a more convenient location. The straining room shall conform to the same specifications as the milk house with the exception of the cooling vat.

22. The usually accepted practices regarding sanitation shall be considered in scoring methods.

V. PASTEURIZED MILK. *Section 12, paragraph (a)* —"Pasteurized Milk" shall be milk which has been subjected to a temperature of not less than 143 degrees Fahrenheit for a period of not less than 30 minutes, or subjected to a temperature of not less than 160 degrees Fahrenheit for a period of not less than fifteen seconds, or milk which has been treated by a process which has been approved by the Advisory Health Board and for the use of which a written permit has been issued by the Secretary.

VI. CLEANSING CONTAINERS, UTENSILS AND EQUIPMENT. *Section 8, paragraph (d); Section 12, paragraph (h); Section 13, and Section 17, paragraph (f).*— The cleansing of containers, utensils and equipment shall include the use of steam or the use of water at a temperature of not less than 180 degrees Fahrenheit, or water at a temperature of not less than 165 degrees Fahrenheit for a period of not less than three minutes.

The Secretary may require the use of an accurate indicating thermometer and a recording thermometer of a type approved by the Secretary on apparatus used for the cleansing of containers, utensils and equipment for the purpose of obtaining an accurate record of the time and temperature used in cleansing containers, utensils, and equipment.

THE ADVISORY HEALTH BOARD OF THE PENNSYLVANIA DEPARTMENT OF HEALTH AT A MEETING HELD IN THE CITY OF HARRISBURG, OFFICE OF THE SECRETARY OF HEALTH, ON NOVEMBER 27, 1945, ADOPTED THE FOLLOWING RULES AND REGULATIONS AMENDING SECTION I OF THE REGULATION ADOPTED APRIL 24, 1940, AS AUTHORIZED UNDER ARTICLE XXI OF THE ADMINISTRATIVE CODE, COMMONWEALTH OF PENNSYLVANIA, ACT OF APRIL 9, 1929, P. L. 177, AS AMENDED.

*Section 1*—Milk to be sold as "Raw Milk" shall be milk prepared in accordance with the general requirements of Section 8 of Act 210, approved July 2, 1935, and Advisory Health Board Rules and Regulations made in accordance with the Act. In addition to the requirements of Act 210 and Advisory Health Board Rules and Regulations made in conformity therewith, "Raw Milk" shall be milk from a cow or cows determined to be free from Bang's Disease (Bovine Brucellosis) in accordance with the result of tests conducted in accordance with the rules, regulations, and practices of the State Department of Agriculture pertaining to the Individual Accredited Herd Plan.

*Section 2*—Applications shall be required and permits issued for the sale of goat's milk in accordance with Act 210, approved July 2, 1935, and Advisory Health Board Rules and Regulations made in accordance therewith, giving due consideration to the difference in the size of the cow and the goat.

RULES AND REGULATIONS OF THE DEPARTMENT OF HEALTH, OF THE COMMONWEALTH OF PENNSYLVANIA, ADOPTED AUGUST 24, 1949, BY THE ADVISORY HEALTH BOARD FOR THE PROTECTION OF THE LIVES AND HEALTH OF THE PEOPLE OF THE COMMONWEALTH BY SPECIFYING THE MANNER OF CAPPING MILK BOTTLES OR CONTAINERS:

On and after September 1, 1950, all Milk sold within this Commonwealth in glass Milk containers must be capped as follows:

> "The cap or cover shall cover the pouring lip to, at least, its largest diameter."

Paper containers shall provide the same protection for the pouring lip.

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## MILK ORDINANCE AND CODE

### 1953 Recommendations of The Public Health Service

Section 11 (p. 143): Milk and Milk Products From Points Beyond the Limits of Routine Inspection.

Milk and milk products from points beyond the limits of routine inspection of the municipality of _____ may not be sold in the municipality of _____, or its police jurisdiction, unless produced and/or pasteurized

under provisions which are substantially equivalent to the requirements of this ordinance, and which are enforced with equal effectiveness, as determined by a milk-sanitation rating.

Provisions for Inspection—This section is intended to permit the health officer to bar milk and milk products shipped in from beyond the normal milkshed, unless he can assure himself that they meet the provisions of the Ordinance. Under no conditions should the health officer authorize the receipt of such shipments when arrangements cannot be made for supervision, unless an emergency exists, in which case permission should be given for its receipt, provided it is labeled "ungraded milk" when distributed.

Approval of Supplies—Subject to laboratory tests upon arrival, the health officer should approve, without his inspection, supplies of milk or milk products from any area or shipper not under his routine inspection (1) when they are produced and processed under regulations substantially equivalent to those of this Ordinance, (2) when they are under routine official supervision, and (3) when they have been awarded, by the milk-sanitation authority of the State of origin, a milk-sanitation rating equal to that of the local supply or, if lower than that of the local supply, equal to 90 percent or more, on the basis of the Public Health Service rating method. Lists of interstate milk shippers and their ratings, as reported by the State health authorities and spot-checked by the Public Health Service, are issued periodically by the Public Health Service for the information of receiving communities. These lists may be obtained either from the State health authority or from the Public Health Service.

Section 7, Item lr, (p. 52): Cows-Health.

All milk for pasteurization shall be from herds which are located in a modified accredited[5] tuberculosis-free area, as determined by the Bureau of Animal Industry, United States Department of Agriculture, and which have been tested for tuberculosis not more than six years prior to the adoption of this ordinance and at least every six years after such test: . . .

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[5] Darold W. Taylor's second report (App. F, p. 45, Court of Appeals): "The areas surveyed are in a modified accredited area, therefore, would meet the requirements of the Public Health Service Code."

4/29

MAY 2 1 1956
HAROLD B. WILLEY, Clerk

No. 916

IN THE

# Supreme Court of the United States

**OCTOBER TERM 1956**

DAIRY PRODUCTS COMPANY
OF UNIONTOWN,

*Petitioner,*

vs.

CLARK J. SLEETH, HEALTH OFFICER OF
MONONGALIA COUNTY, WEST VIRGINIA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

## BRIEF FOR RESPONDENT IN OPPOSITION

JOHN G. FOX,
*Attorney General,*
*State of West Virginia,*
*Charleston, West Virginia.*

ALBERT M. MORGAN,
*Prosecuting Attorney,*
*Monongalia County,*
*Morgantown, West Virginia.*

GEORGE R. FARMER,
*Morgantown, West Virginia,*
*Counsel for Respondent.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1956

## No. 916

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DAIRY PRODUCTS COMPANY
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VS.

CLARK J. SLEETH, HEALTH OFFICER OF
MONONGALIA COUNTY, WEST VIRGINIA,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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## BRIEF FOR RESPONDENT IN OPPOSITION

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*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Respondent opposes the granting of the petition for certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above case on December 27, 1955.

## QUESTIONS PRESENTED BY THE DECISION OF THE LOWER COURTS.

Respondent disagrees with the statement of the Questions Presented as set out in Petitioner's Petition and asserts the following:

The constitutionality of the West Virginia Law and Regulations (Petitioner's Appendix III, pages 39—43) is not raised by pleadings and was conceded in both lower courts (Petitioner's Appendix I, page 31) and by the Petition of Petitioner, page 23.

Petitioner's milk is produced and pasteurized under Pennsylvania and City of Pittsburgh Regulations which recognize and permit inspections and laboratory tests to be made by Petitioner's own employees while the West Virginia law requires the same inspections to be made by a public official—the health officer. (Petition, page 4 and Appendix III, pages 41-42).

West Virginia law and Regulations promulgated thereunder require the Respondent to refuse a permit for sale of milk and milk products produced outside the limits of routine inspection by state officials unless *produced and/or pasteurized* under provisions equivalent to West Virginia Regulations and then only after the health officer shall have satisfied himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions (Petitioner's Appendix III, page 42).

The duty imposed by law upon the Respondent involves the construction and application thereof and the exercise of judgment and discretion in the enforcement of the law.

Thus the sole question for determination on this Petition is whether the Respondent has arbitrarily exercised that judgment and abused that discretion.

This is the issue determined by the Court of Appeals and the District Court. (Petitioner's Appendix I, pages 34—36; Appendix K—Record—Court of Appeals, page 122).

## RESPONDENT'S STATEMENT OF THE CASE.

In general the Petitioner's statement of the case is correct. However, some omissions material to consideration of the questions raised are now noted.

For many years prior to 1951 Petitioner held a permit to sell milk in the cities of Uniontown and Pittsburgh, Pennsylvania, and as early as 1947 and again in 1950 it had applied for a similar permit to sell milk in Monongalia County, West Virginia, but these applications were refused after inspections made by the predecessor's of Respondent. (Appendix C—Record—Court of Appeals, pages 17—21).

At no time prior to April, 1954, did the farms and plants from which Petitioner's milk was produced and in which it was stored and pasteurized, achieve a rating of as much as 90% as determined by inspections made by officials of the Health Department of West Virginia and the United States Public Health Service, and the Enforcement of Sanitary Standards by Pennsylvania, Uniontown, Pittsburgh and Petitioner's employed inspectors and officials has never been of such character as to meet the requirements of the United States Public Health Recommended Milk

Code which is identical with West Virginia Regulations (See Record—Appendix A and Appendix F).

Concerning the Enforcement Agency (City of Pittsburgh) the United States Public Health Service Inspector in his report of April 12—14, 1954, (Record —Appendix F, pages 44—47) said that there was no documentary evidence to indicate that dairies and plants had been inspected once each six months; or that disinfection temperatures and chlorine strengths were checked; or that pasteurization plant equipment was tested at required intervals; that Petitioner's laboratory did not meet required standards; that farm producer samples of milk are not collected by the Pittsburgh Health Department; that records are not being fully kept on all phases of the milk program; that because of changes then being made in the status of the milk sanitation program it was not practical to tabulate a numerical rating on Enforcement Methods and that it was probable such rating could be made in six months.

Upon rehearing in the District Court Mr. H. D. Martin, Sanitarian, Monongalia County, Health Department of West Virginia, and George R. Farmer, one of Counsel, in this case testified fully in support of the facts set out in the affidavit filed as the basis for rehearing and their testimony is uncontradicted that the condition of the records in the Pittsburgh Health Department more than seven months following the last Taylor report, had not been improved and were in a chaotic condition. (Record—Appendices N—O, pages 131—138).

While it is alleged in the complaint that the Regulations and Standards of the City of Pittsburgh and the

State of Pennsylvania are equivalent to and more stringent than those of West Virginia and this same fact is asserted in the testimony, the Pittsburgh Regulations were never introduced into evidence. The basic law of Pennsylvania (Sec. 18—Petitioner's Appendix III page 57) specifically provides that municipalities may ordain and enforce additional requirements in excess of those having state wide application. Any municipality in Pennsylvania may adopt the United States Public Health Service Recommended Ordinance and thus fully conform to West Virginia requirements. No state action is necessary.

## REASONS FOR REFUSING THE WRIT.

1. The question presented by the decisions of the lower courts and the decisions themselves do not fall within any of the categories set out in Rule 19, Part V of the Rules of this Court. Congress has not enacted any federal laws or regulations pertaining to the sale of milk and the decisions of this Court recognize that local regulations are applicable even though interstate commerce may be affected.

> Dean vs. Madison, 340 U. S. 349, 95 L. Ed. 329.
>
> Milk Control Board vs. Eisenburg etc., 306 U. S. 346, 83 L. Ed. 752.
>
> Baldwin vs. Seelig, 294 U. S. 511, 79 L. Ed. 1032.
>
> Hood vs. DuMond, 336 U. S. 525, 93 L. Ed. 865.

The Congress of the United States has since 1895 from time to time enacted local regulatory laws for sale of fluid milk in the District of Columbia which provide

for inspection of farms and plants by the Health Officer of the District as a prerequisite to maintenance of a license to sell milk in the District, even though the milk originates in the states, and further provides that no officer or employee of the Health Department of the District shall in his private capacity serve for fee or reward any person licensed to maintain a dairy farm or dairy in the District or to bring milk into the District.

1940 Code of District of Columbia, Sections 33—301—321 and especially 33—320 and 33—321.

The West Virginia Milk Regulations are identical with the Model Milk Ordinance Recommended by the United States Public Health Service and which provides standards recognized as appropriate in the interest of public safety, health and welfare by this Court in Dean vs. Madison.

This Court has often upheld the right of states to regulate, in the interest of the safety, health and well being of its citizens, the importation into the state of livestock, food stuffs, etc. as exemplified by the following:

Certificate of freedom from Bangs disease of herd from which imported cattle are derived, to be executed by chief livestock sanitary official of state of origin.

Mintz vs. Baldwin, 289 U. S. 346, 77 L. Ed. 1245.

Requirement for State Inspection of livestock from other states as required by state statute not met by inspection by federal inspector enforcing federal law.

Reid vs. Colorado, 187 U. S. 137, 47 L. Ed. 108.

State law requiring labelling of animal foodstuffs as to content and providing for inspection by state inspectors upheld even though standards provided may require foodstuff to conform to exact standards of the State of Indiana.

Savage vs. Jones, 225 U. S. 501, 56 L. Ed. 1182.

The state has power to protect the health of its people and to impose reasonable restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the state and the safeguards required.

Price vs. Illinois, 238 U. S. 446, 59 L. Ed. 1400.

2. The Health Officer in considering whether the Pennsylvania Statute and Regulations are equivalent to those of West Virginia followed to the very letter the United States Public Health Service Recommended Ordinance and Interpretations (1953 Revision of Public Health Bulletin No. 220, 1939) as set out on pages 44 and 43 respectively,

> "Industry Inspections—Where the Ordinance, as adopted locally, contains the proviso of footnote 21, the health officer may accept results of periodic industry inspection of producer dairies provided such inspection is a *supplement to, and not a substitute for, official inspection.*" (Italics Ours)

Footnote 21 referred to reads:

"Where the State Law permits the following pro-

> viso may be inserted; "Provided, the health officer may accept, as a supplement to official inspection, the results of periodic inspections by industry, of producer dairies which he checks periodically and finds satisfactory."

On page 43 (Ibid) in commenting on the first sentence of Section 5 of the Ordinance which reads,

> "Prior to the issuance of a permit and at least once every six months thereafter, the health officer shall inspect all dairy farms and all milk plants . . ."

the comment and interpretation is,

> "The first sentence of this section should not be taken to imply that one inspection every six months is a desirable frequency. It should be regarded, instead, as the legal minimum."

These interpretations and instructions are conclusive that the very spirit and purpose of the Regulation is to safeguard the public health through public officials who actually perform all duties required and not to entrust enforcement to the permit holder, subject only to noncompulsory and inadequate official "checking."

On page VI Preface to the foregoing Bulletin is the following statement:

> "As of September 1, 1952, the Milk Ordinance recommended by the Public Health Service had been adopted by 1,542 municipalities and 397 counties. In addition it serves as the basis for state law or regulations of 34 States and 2 Territories. It is in effect State-wide in all of these States and both Territories. It is used also, as the standard for milk served on interstate carriers, and has been incorporated into Federal Specifications."

If Courts substitute their judgment for that of trained scientists and administrators upon questions which those scientists and administrators have spent their lives in mastering, and then go further and hold that because the expert has reached a different conclusion that he is arbitrary and has deprived a disgruntled nonconforming litigant of his constitutional rights, the wheels of progress will grind to an abrupt stop. The lower Court did just that in this case.

3. A court cannot by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary disharge of his official duties—such action would be productive of nothing but mischief.

Keim vs. United States, 117 U. S. 290, 44 L. Ed. 774.

Where the duty of an executive or administrative officer is not so plainly prescribed as to be free from doubt and equivalent to a positive command, but depends upon statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Wilbur vs. U. S. Ex Rel. Kadrie, 281 U. S. 206, 74 L. Ed. 809.

Ex Rel. Giard, etc. vs. Helvering, 301 U. S. 540, 81 L. Ed. 1272.

U. S. vs. Black, 128 U. S. 52, 32 L. Ed. 354.

Ex Rel. Hall vs. Payne, 254 U. S. 343, 65 L. Ed. 295.

In the present case the statute and Regulations under which the Respondent acted and with whose provisions he is charged with enforcement do amount to a positive command. But the command is that the Respondent shall not permit sale of milk "from points beyond the limits of the State of West Virginia . . . unless produced and or pasteurized under provisions equivalent to the requirements of this Regulation; provided that the health officer shall satisfy himself that the officer having jurisdiction over the production and processing is properly enforcing such provisions." The lower Court substituted its own judgment upon the mixed questions of law and fact which had been determined by the the Respondent in the course of his official duties, for that of the health officer. The Circuit Court reversed on this ground.

4. The Respondent followed eactly the "reasonable and adequate alternative" suggested in Dean vs. Madison (supra) in that he determined the extent of enforcement of sanitary standards in the exporting area by verifying the accuracy of safety ratings given the Petitioner by the Pennsylvania (Uniontown and Pittsburgh) authorities, through an authorized Senior Scientist of the United States Public Health Service who upon two inspections rendered an adverse report.

5. The Supreme Court of the United States will not grant a writ of certiorari merely to review the evidence or inferences drawn from it.

General Talking Pictures Corporation vs. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273.

National Labor Relations Board vs. Waterman S. S. Corp., 309 U. S. 206, 84 L. Ed. 704.

United States vs. Johnston, 268 U. S. 220, 69 L. Ed. 925.

Since the validity of the statute and Regulations under which Respondent acted are not questioned, the sole question for consideration is, "Did Respondent act arbitrarily in reaching his decision that the Pennsylvania Regulations and the enforcement procedures to implement them are not the equivalent of West Virginia Regulations?" A determination of this question involves consideration of all the evidence in the case.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the writ should be denied.

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